STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
Kirsten Frank Kelly, P.J., and Douglas B. Shapiro and Ronayne Krause, JJ.

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v

THABO JONES
Defendant-Appellee.

No. 147735

L.C. No. 12-003749-FH
COA No. 312966

APPELLANT'S BRIEF
ORAL ARGUMENT REQUESTED

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Summary of Argument

MCL § 257.626 sets forth a series of reckless driving offenses, graduated in penalty based on the consequences caused by the reckless driving. Paragraph (5) of the statute precludes an instruction to a jury on the offense of moving violation causing death. Moving violation causing death is a subset of the elements of reckless driving causing death based not on a graduation of the consequences of the act, but on the conduct itself. Reckless driving is a moving violation. It is thus not possible to commit that offense without also having committed the offense of moving violation causing death.

Under MCL § 768.32, if it applies here, moving violation causing death is an "inferior degree" of the offense of reckless driving causing death. It is one, however, that the legislature has prohibited instruction on, though not, at least explicitly, precluding a verdict on the lesser offense at a bench trial. A criminal defendant—outside of the death-penalty context, and there the right is premised on the Eighth Amendment—has no due process right to an instruction on an offense that is a subset of the elements of the greater offense, and is supported by a rational view of the evidence. Nor does preclusion of such an instruction deny the right to jury trial, as the defendant will have a trial by jury on all the charged elements, with the jury properly instructed on them, and instructed to return a verdict of guilty only if *those* elements have been proven beyond a reasonable doubt.

The statutory prohibition also is not concerned with simply the dispatch of judicial business; indeed, this Court has previously held that "determining what charges a jury may consider does not concern merely the 'judicial dispatch of litigation.' . . . The powers of the courts with reference to such matters are derived from the statutes." Under this Court's precedents, then, a

preclusion of an instruction—a legislative determination of "what charges a jury may consider"—is substantive, not procedural, and so does not offense principles of separation of powers.

Statement of Questions

I.

By statute, MCL § 257.626(5), a jury in a reckless driving causing death prosecution "shall not be instructed regarding the crime of moving violation causing death." *People v Cornell* holds that "determining what charges a jury may consider does not concern merely the 'judicial dispatch of litigation.' . . . The powers of the courts with reference to such matters are derived from the statutes." Is the statutory prohibition unconstitutional, as the Court of Appeals held?

- **Does a legislative provision barring consideration of an lesser offense that is a subset of the elements of the charged offense violate the state constitutional separation of powers doctrine, Const 1963, art 3, § 2?**

  The People answer NO.

  The Court of Appeals answered YES

- **Does MCL § 257.626(5) violate a defendant's right to a jury trial by foreclosing a jury instruction on an offense that is a subset of the elements of the charged offense?**

  The People answer NO.

  The Court of Appeals answered YES

- **Is MCL § 257.601d a subset of the elements of MCL § 257.626(4)?**

  The People answer YES.

  The Court of Appeals answered YES

Statement of Facts

Defendant is charged with reckless driving causing death, under MCL 257.626(4). Subparagraph (5) prohibits an instruction on the offense of "moving violating" causing death: "In a prosecution under subsection (4), the jury shall not be instructed regarding the crime of moving violation causing death." The trial judge granted defendant's motion that at trial, which was then scheduled for February 5, 2013, the prohibited lesser offense shall be instructed upon.. The trial judge held that the statute is unconstitutional as a violation of separation of powers. See 32-34A.

The Court of Appeals granted the People's application for leave to appeal, and held that the statute is unconstitutional both as a denial of the right to jury trial, and, as the trial judge held, a violation of separation of powers, intruding into matters reserved, then, to the judiciary.

This Court granted the People's application for leave to appeal on November 27, 2013.

Argument

I.

By statute, MCL § 257.626(5), a jury in a reckless driving causing death prosecution "shall not be instructed regarding the crime of moving violation causing death." *People v Cornell* holds that "determining what charges a jury may consider does not concern merely the 'judicial dispatch of litigation.' . . . The powers of the courts with reference to such matters are derived from the statutes." The statutory prohibition is not unconstitutional.

Introduction

In its order granting the People's application for leave to appeal, this Court directed that the parties brief "(1) whether a legislative provision barring consideration of a necessarily included lesser offense violates the separation of powers doctrine, Const 1963, art 3, § 2; (2) whether MCL § 257.626(5) violates a defendant's right to a jury trial by foreclosing a jury instruction on a lesser offense; and (3) whether MCL § 257.601d is a necessarily included lesser offense of MCL § 257.626(4)." The People will proceed in reverse order.

Discussion

A. The Offense of Moving Violation Causing Death Is a Subset of the Elements of the Offense of Reckless Driving Causing Death

Throughout these proceedings, the People have conceded that the offense known as moving violation causing death is a subset of the elements of the offense known as reckless driving causing death. It may be that this concession was rash,[1] but the People think not.[2] One

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[1] And it may be that because the parties agreed on this point the Court of Appeals did not discuss it in any depth, saying only that MCL § 257.625(5) "does not change the fact that, by definition, moving violation causing death remains a necessarily included lesser offense of reckless driving causing death" *People v. Jones*, 302 Mich.App 434 (2013) (the Michigan Court

offense is included within another under MCL § 768.32 when it is a subset of the elements of the greater offense.[3] An examination of the statutory texts is thus required. As to the greater offense, MCL § 257.626(2),(4), together provide, in pertinent part:

> [A] person who operates a vehicle . . . in willful or wanton disregard for the safety of persons or property . . . and by the operation of that vehicle causes the death of another person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not less than $2,500. 00 or more than $10,000.00, or both.[4]

And as to the lesser offense, MCL § 257.601d(1) provides:

> A person who commits a moving violation that causes the death of another person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $2,000.00, or both.[5]

The question, then, is whether MCL § 257.601d contains an element that is not contained within MCL § 257.626(2),(4), and the nub of the matter, given that the offenses have the element of

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of Appeals Reports page numbers are not currently available; see 839 N.W.2d 51, 54).

[2] If the People are mistaken on this point, and moving violation causing death is *not* an included offense of reckless driving causing death, then all challenges to the statutory prohibition disappear, as instructing on moving violation causing death would be improper without regard to the statute.

[3] *People v Cornell*, 466 Mich. 335 (2012); *People v. Nyx*, 479 Mich. 112, 121 (2007).

[4] MCL § 257.626(2) establishes the conduct that is prohibited; paragraph (4) provides that the offense is aggravated if the described conduct results in a death. The two paragraphs are merged here for convenience.

[5] A moving violation is defined in the statute as "an act or omission prohibited under this act or a local ordinance substantially corresponding to this act that involves the operation of a motor vehicle, and for which a fine may be assessed." MCL § 257.601d(4).

causing of the death of another person in common, is whether one can drive recklessly without committing a moving violation. The answer is no.

Looking at the statutes involved together, a hierarchy of offenses can be discerned. The hierarchy of offenses in MCL § 257.626 is, proceeding from the higher offense to the lesser offenses:

- A person person who operates a vehicle in willful or wanton disregard for the safety of persons or property and by the operation of that vehicle causes the death of another person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not less than $2,500.00 or more than $10,000.00, or both.

- A person who operates a vehicle in willful or wanton disregard for the safety of persons or property and by the operation of that vehicle causes serious impairment of a body function to another person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not less than $1,000.00 or more than $5,000.00, or both.

- A person who operates a vehicle in willful or wanton disregard for the safety of persons or property is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.

And so, the statute graduates the offenses based not on a descending order of either culpable mental state or conduct, but on a descending order of the *harm* or consequences of the accused's conduct. But the statute also could be graduated based instead on either the culpable mental state of the accused, or the conduct engaged in, as many statutes do. For example, the homicide statutes are graduated based on the legislatively perceived responsibility for a particular *shared* consequence[6]—the death of the victim. First-degree premeditated murder requires a premeditated intent to take life; second-degree murder, which is a subset of the elements of first-

[6] See MCL § 750.316; MCL § 750.317; MCL § 750.321.

degree murder and thus an included offense under MCL § 768.32, requires either an unpremeditated intent to take life, an intent to do great bodily harm, or an act in wanton and wilful disregard of the likelihood that the natural tendency of the behavior is to cause death or great bodily harm;[7] and manslaughter, which is a subset of the elements of first-degree murder and second-degree murder and thus an included offense under MCL § 768.32, requires an act done without using ordinary care to prevent injuring another when, to a reasonable person, it must have been apparent that the result was likely to be serious injury.[8] The consequence—the death of the victim—is the same for each offense; culpability is measured by the mental state of the accused that accompanies his or her conduct.

An included offense, of course, does not have to be included as a paragraph or section within a single statute. First-degree murder, second-degree murder, and manslaughter are each in separate statutes—and manslaughter is not even legislatively expressed as a "degree" of homicide—yet they form a hierarchy of offenses in descending order of culpability as assigned by the legislature. Moving violation causing death is in a separate statute, MCL § 257.601d, from the reckless driving offenses in MCL § 257.626.[9] But it is a subset of the elements of reckless driving causing death based not on the consequences of the defendant's act, which is the

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[7] *People v. Goecke,* 457 Mich. 442, 464 (1998)

[8] For convenience sake, the People refer here only to the offense known as involuntary manslaughter under MCL § 750.321, and not voluntary manslaughter under that statute, or to other statutory forms of manslaughter.

[9] Though certainly not binding on the Court, it appears that the legislature, by including the prohibition on instruction on moving violation causing death in MCL § 257.626(5), thought it to otherwise be an included offense of reckless driving causing death under MCL § 768.32, though it could have been acting out of an excess of caution.

measure of culpability in MCL § 257.626, but based instead on the *conduct* or behavior of the accused. Including moving violation causing death in the hierarchy of offense, the offense scheme is:

- A person person who operates a vehicle in willful or wanton disregard for the safety of persons or property and by the operation of that vehicle causes the death of another person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not less than $2,500. 00 or more than $10,000.00, or both.

- A person who operates a vehicle in willful or wanton disregard for the safety of persons or property and by the operation of that vehicle causes serious impairment of a body function to another person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not less than $1,000.00 or more than $5,000.00, or both.

- *A person who commits a moving violation that causes the death of another person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $2,000.00, or both.*

- A person who operates a vehicle in willful or wanton disregard for the safety of persons or property is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.

As with the homicide statutes, and offenses such as assault with intent to murder and assault with intent to do great bodily harm, where the offenses are graduated based on the mental state of the accused, MCL § 257.601d fits neatly into the statutory scheme here as a one-year included offense between a 5-year offense and a misdemeanor, based on less culpable conduct than the greater offense.[10]

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[10] MCL § 257.601d is quite clearly a substitute for the former negligent homicide statute, repealed 2008 PA 463. See *People v. Weeder,* 469 Mich. 493, 497 (2004), former MCL § 750.325 (now repealed by 2008 PA 463). And MCL § 257.626 as amended in effect substitutes as the appropriate charge for manslaughter committed by operation of a motor vehicle, formerly brought under the manslaughter statute, MCL § 750.321.

It is not possible to commit the offense of reckless driving causing death without committing the offense of moving violation causing death, just as it is not possible that one can commit assault with intent to murder without committing assault with intent to commit great bodily harm; the less culpable conduct is included within the greater. By statute, a person who is convicted of a violation of MCL § 257.626(2),(4) commits a moving violation, punishable by 6 points on his or her driving record.[11] A moving violation that is committed with willful or wanton disregard for the safety of persons or property that causes death encompasses a moving violation that causes death but was *not* committed with wanton and wilful disregard for the safety of others or property; a person cannot commit the former without having committed the latter.[12] Moving violation causing death is thus a subset of the elements of reckless driving causing death, and thus an "inferior degree" of that offense under MCL § 768.32, assuming the applicability of MCL § 768.32 to a situation where the legislature has directed that an instruction on a "subset" lesser offense not be given.

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[11] MCL § 257.320a.

[12] Compare *People v. Brown,* 267 Mich. App. 141, 150-151 (2005): "It defies common sense to suggest that a defendant could commit an assault with the intent to kill another person without also intentionally and knowingly inflicting great bodily harm. In other words, *it is impossible to kill someone without intending to seriously injure that person in the process. Therefore, it is impossible to commit the offense of assault with intent to commit murder without first committing the offense of assault with intent to do great bodily harm less than murder.* Because *the lesser mens rea of intent to do great bodily harm is included in the greater mens rea of intent to kill* in the context of assault offenses, the elements of assault with intent to do great bodily harm less than murder are completely subsumed in the offense of assault with intent to commit murder" [emphasis supplied].

Coda

Though moving violation causing death is a subset of the elements of reckless driving causing death, so as to constitute an included offense under MCL § 768.32 as correctly construed by *Cornell*, because the legislature has, specifically and unequivocally, said that moving violation causing death may *not* be instructed on in a reckless driving causing death case, it could be said that though moving violation causing death is an included offense of reckless driving causing death under MCL § 768.32, by legislative definition—the preclusion of an instruction on the subset lesser offense—moving violation causing death is *not* an included offense, having been "defined out" of MCL § 768.32 by a more specific statute. The People are of the view that the legislature has the authority to make a general rule as to included offenses, and to define included offenses differently for specific situations, as it determines so to do. And so the legislature could decide by statute that certain offenses that are *not* a subset of the elements of the charged offense are nonetheless "inferior degrees" of the charged offense and may be instructed upon, and could decide, as here, that certain offenses that *are* a subset of the elements of a greater offense are *not* "inferior degrees" of the charged offense and may *not* be instructed upon. As to the former, this Court has rejected that approach, at least absent a more definite legislative statement,[13] and thus

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[13] See *People v. Nyx*, 479 Mich. 112 (2007). The People agree with the dissent of Justice Corrigan that the legislature may in its discretion choose to define "inferior degrees" of greater offenses by creating a "degreed offense" scheme without regard to whether the lesser degrees are subsets of the elements of the greater offenses. Indeed, even in the death-penalty situation, where the United States Supreme Court has held that an offense that *is* an included offense to the charged capital offense under state law and supported by the evidence must be instructed on as a matter of the Eighth Amendment, *Beck v Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), the Court has also held that *whether* an offense *is* an included offense of the capital-murder offense is a matter of state law, so that if a lesser offense is not included as a matter of state law, then it need not be instructed upon, and an "all or nothing" instruction is permissible. *Hopkins v. Reeves,* 524 U.S. 88, 118 S.Ct. 1895, 141 L.Ed.2d 76 (1998). The Court's opinion in

might well reject the latter. But in either event, the question is whether the legislative preclusion of the instruction is concerned only with the dispatch of judicial business. Whether MCL § 257.626(5) is viewed as "defining out" moving violation causing death as an inferior degree of reckless driving causing death, or as a statutory prohibition on instruction on an offense that *is* an inferior offense because a subset of the elements of the charged offense, the question is the same—does the statute violate separation of powers? Different trains; same station. The answer is that separation of powers is not violated by the statute, an argument the People will make in section C.

B. That MCL § 257.626(5) prohibits instruction on moving violation causing death in a prosecution for reckless driving causing death does not violate a defendant's right to a jury trial

1. The Court of Appeals rationale

In addition to holding that MCL § 257.626(5) violates separation of powers principles of our State Constitution, the Court of Appeals also found that the statutory prohibition of an

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Nyx that a lesser offense in a "degreed-offense" scheme is not an included offense unless a subset of the elements of the greater offense, in disagreeing with Justice Corrigan's citation of *Hopkins* as support for her position, argued that "*Hopkins* actually supports our opinion because it specifically states that it is a 'distortion' to allow a defendant to be convicted of a cognate offense because it would allow the jury to find a defendant guilty of elements the state had not attempted to prove." 479 Mich. at 131, fn 46. But *Hopkins* only found this "distortion" to exist because as a matter of state law the lesser homicide offense was *not* included within the capital offense. Nothing in *Hopkins* suggests that a state statutory scheme including lesser offenses in a "degreed" scheme that are not subsets of the greater offense is impermissible. Indeed, had Nebraska considered that, under state law, the "cognate" offense *was* an included offense of the capital murder charge, it is plain that the Court would have found no constitutional difficulty if the jury *was* instructed on it. As the Court put it, "Almost all States, including Nebraska, provide instructions only on those offenses that have been deemed to constitute lesser included offenses of the charged crime. . . . We have never suggested that the Constitution requires anything more," the Court specifically noting in footnote 6 that States take various approaches to defining included offenses. 118 S.Ct. at 1900. But this ship sailed in Michigan in *Nyx*, at least unless and until the legislature decides to make a more definitive statement on the matter.

instruction on moving violation causing death in a reckless driving causing death case is "a violation of the right to trial by jury."[14] That violation occurs, said the court, because the statute precludes only an instruction to a jury on the subset offense, and does not "state that a trial court sitting as the finder of fact may not consider the offense of moving violation causing death nor that it may not convict a defendant of this lesser included offense."[15] At least a part of the court's rationale appears to be an amalgam of its holding that the statute violates separation of powers with points concerning jury trial, as the court bases a part of its analysis on its conclusion that "The limitation in MCL 257.626(5) is not a statement of substantive law. Instead, MCL 257.626(5) is an infringement on the exclusive role of the judiciary to establish procedures to vindicate constitutional rights, as well as an infringement on the fundamental right of criminal defendants to a properly instructed jury."[16] But this leg of the Court of Appeals' analysis, basing its conclusion that the legislative prohibition on the instruction is "not a statement of substantive law," runs headlong into this Court's holding in *People v Cornell* that "Determining what charges a jury may consider does not concern merely the 'judicial dispatch of litigation.'. . . Rather, the statute concerns a matter of substantive law."[17] The majority opinion is oblivious to the collision, despite the fact that this holding of *Cornell* is discussed in the dissenting opinion.[18]

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[14] *Jones*, 839 N.W.2d at 56.

[15] *Jones*, 839 N.W.2d at 56.

[16] *Jones*, 839 N.W.2d at 56.

[17] *People v. Cornell*, 466 Mich. 335, 353 (2002).

[18] *Jones*, 839 N.W.2d at 58 (Kelly, J., dissenting). The People have always thought it to be a "fundamental principle that only . . . [the Michigan Supreme] Court has the authority to overrule one of its prior decisions. Until [the] Court does so, all lower courts and tribunals are

The People will return to this point in section C. And the notion that the statute infringes on the "the exclusive role of the judiciary to establish procedures to vindicate constitutional rights" is simply not true;[19] the judiciary has no such "exclusive" role. Executive and legislative members of government take an oath to support and defend the constitution,[20] and certainly the legislature can enact, and the executive put into effect, procedures to protect or "vindicate" constitutional rights held by citizens under our State and Federal constitutions.[21]

The heart of the majority opinion as to its jury trial holding appears in its statement that:

> MCL § 257.626(5) is also infirm in that, under the statute, a criminal defendant must give up his or her right to a jury in order for the fact-finder to consider the lesser included offense. Significantly, a defendant has no right to a bench trial unless the prosecution and the judge agree. MCL 763.3; MCR 6.401. Therefore, the statute places defendants in the position of having to trade one right for another without even the ability to make an autonomous choice, and it presents the prosecution with a

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bound by that prior decision and must follow it even if they believe that it was wrongly decided or has become obsolete. . . ." *Paige v. City of Sterling Heights*, 476 Mich. 495, 524 (2006).

[19] Though it may seem small beer, this is a statement of principle "which it is beyond human nature to leave unanswered," *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 981, 112 S.Ct. 2791, 2875, 120 L.Ed.2d 674 (1992)(Scalia, J. dissenting), and which inhabits the Court of Appeals analysis.

[20] 1963 Mich.Const. Art 11, § 1: "All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state . . . ."

[21] Indeed, 42 USC § 1983 is designed to vindicate constitutional rights of citizens, and provisions, and there are executive-branch agencies, such as the Michigan Civil Rights Commission created for this purpose. Further, many rules of procedure are designed to protect constitutional rights.

potentially improper basis for refusing to consent to a requested bench trial.[22]

The People will address the question of whether there is a constitutional right to an included-offense instruction in a non-capital case, and then turn to whether the statute unconstitutionally burdens the right to jury trial in the manner found by the Court of Appeals, before addressing the separation of powers holding of the Court of Appeals.

2. A defendant does not have a constitutional right to an instruction on an offense that is a subset of the elements of the charged offense, and supported by evidence that puts in dispute the element that distinguishes the greater offense from the lesser

Defendant has argued that "the constitutional right to a trial by a jury properly instructed on *all elements of a crime* renders the exclusion in MCL § 257.626(5) unconstitutional."[23] But this is not so. Defendant has requested a jury trial. The jury *will* be "properly instructed on all elements" of the *charged* offense, and the prosecution will bear the burden of persuasion beyond a reasonable doubt as to each. Defendant has cited no precedent explaining how MCL § 257.626(5) denies him his right to jury trial on the *charged* offense. The claim is actually one that due process requires that a defendant receive an instruction on all offenses that are subsets of the elements of the charged offense when a rational view of the evidence supports conviction on the lesser offense. But the overwhelming weight of precedent is to the contrary.[24]

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[22] *People v. Jones*, 839 N.W.2d at 56.

[23] Defendant's answer to the People's application for leave to appeal, p.7 (emphasis supplied).

[24] It appears that only the Third Circuit has applied *Beck v Alabama*, infra, to cases where the charged offense is a noncapital offense. See *Vujosevic v. Rafferty*, 844 F.2d 1023 (CA 3,1988).

The United States Supreme Court has addressed the question, but only in the context of death-penalty cases, where instruction on a "nondeath" included offense was held required by due process, where supported by the evidence.[25] The rationale was not due process, but the Eighth Amendment, under the "death is different" jurisprudence of the Supreme Court.[26] The Court held that where a capital offense is charged and under state law there is a non-death included offense to that capital offense, state statute may not preclude instruction on the included offense, for the Eighth Amendment precludes any procedure that "enhances the risk of an unwarranted conviction," the Court expressly disavowing any due process holding with regard to noncapital offenses.[27] The Supreme Court has made the principle that drove the decision in *Beck* clear:

> [In] capital case[s] . . . we have held that the Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case. . . . Outside of the capital context, we have never said that the possibility of a jury misapplying state law gives rise to federal constitutional error. To the contrary, we have held that instructions that contain errors of state law may not form the basis for federal habeas relief.[28]

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[25] *Beck v. Alabama,* 447 U.S. 625, 638, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

[26] "As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments. . . ." *Beck,* 110 S.Ct. at 2390.

[27] *Beck,* 110 S.Ct. at 2390. And see *Herrera v Collins,* 506 U.S. 390, 405 113 S.Ct. 853, 863, 122 L.Ed.2d 203 (1993): "We have . . . held that the Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed."

[28] *Gilmore v Taylor,* 508 U.S. 333, 113 S.Ct. 2117-2118, 124 L Ed 2d 306 (1993). And as noted in the dissenting opinion there, "In *Beck,* the Court's concern and the reason for the required lesser included offense instruction was that *jurors might ignore their reasonable-doubt instruction.* Where the defendant is " 'plainly guilty of *some* offense,' " . . . there is a risk that absent a lesser included offense instruction, the jurors will convict a defendant of capital murder, thereby exposing him to the death penalty, because they do not want to set a guilty person free. In

Courts since the *Beck* decision have held almost unanimously that its rationale applies *only* in the context of a charged offense that carries the death penalty. The 10th circuit, for example, has held that "The Supreme Court has never recognized a federal constitutional right to a lesser included offense instruction in non-capital cases, and neither has this court."[29] And the Colorado Court of Appeals has held similarly that "While the Constitution sometimes compels lesser included offense instructions in capital cases, *see Beck v. Alabama,* . . . that constitutional entitlement does not extend to noncapital cases,"[30] that court also observing that "The [Supreme] Court subsequently made it clear *Beck's* rationale was rooted in *Eighth Amendment* concerns about the reliability of the determination of guilt in a capital case."[31] And the Wisconsin Court of Appeals has concluded that "the uniqueness of the death penalty led the Court in *Beck* to depart from the usual rule that jurors are presumed to obey their oaths and to render a true verdict on the evidence presented to them. When, as here, the death penalty cannot be imposed, failure to instruct the jury on a lesser-included offense does not violate due process."[32]

The jurors here will be instructed on the elements of the offense, and instructed that they must find each proven beyond a reasonable doubt. An instruction to the juror for "emphasis" that

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other words, the failure to provide a lesser included offense instruction *in the capital context* is a problem only to the extent that *we fear that jurors will choose to disregard or nullify their reasonable-doubt instruction.*" *Gilmore,* 113 S.Ct 2128 (Blackmun, dissenting) (emphasis supplied).

[29] *Dockins v. Hines,* 374 F.3d 935, 938 (CA 10, 2004). See also *Campbell v. Coyle,* 260 F.3d 531, 541 (CA 6, 2001).

[30] *People v. Brown,* 218 P.3d 733, 736 (Colo.App., 2009).

[31] *People v. Sherman,* 172 P.3d 911, 916 (Colo.App., 2006) (emphasis added).

[32] *State v. Nicholson,* 435 N.W.2d 298, 303 (Wis.App.,1988).

they may not convict if they believe defendant did something "wrong," but only if they find that the elements of the offense are proven beyond a reasonable doubt, would not be inappropriate. And there is a heavy presumption that jurors understand and follow their instructions.[33] Jurors are routinely expected to follow instructions limiting their use of prior inconsistent statements to consideration of the credibility of the witness and not for the truth of the matter stated, to use Miranda-defective confessions only insofar as they impeach the credibility of the defendant's testimony, but not for the truth of their content, to consider convictions of a witness offered for impeachment only for that purpose, and to follow many other limiting instructions in circumstances where the evidence is subject to inferences that the law does not allow to be considered in deciding the case. The jury can certainly follow the instructions that will be given here; the legislature did not act unconstitutionally in so concluding.

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[33] See e.g. *United States v. Scheffer*, 523 U.S. 303, 336-337, 118 S.Ct. 1261, 1278, 140 L Ed 2d 413 (1998); *Richardson v. Marsh,* 481 U.S. 200, 211, 107 S.Ct. 1702, 1709, 95 L.Ed.2d 176 (1987); *Weeks v. Angelone,* 528 U.S. 225, 234, 120 S.Ct. 727, 733, 145 L.Ed.2d 727 (2000) ("A jury is presumed to follow its instructions"); *Bingham v. Zolt,* 66 F.3d 553 (CA 2,1995); *People v. Graves*, 458 Mich. 476, 486 (1998)("It is well established that jurors are presumed to follow their instructions").

3. That the statute prohibits an instruction to a jury on moving violation causing death but contains no limitation regarding the verdict a trial judge can reach in a bench trial[34] violates no constitutional right of the accused

The Court of Appeals majority opinion said that the statutory prohibition on the instruction on the lesser offense is "infirm" because "a criminal defendant must give up his or her right to a jury in order for the fact-finder to consider the lesser included offense," a maneuver which can be blocked by either the trial judge or the prosecuting attorney. The defendant, the court reasoned, must "trade one right," the court presumably referring to the right to jury trial, "for another," the court presumably referring to the "right" to the possibility of an included-offense verdict, a "right" the court previously found by holding that the statute violates separation of powers principles.[35] If the Court of Appeals is wrong concerning the separation of powers

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[34] Compare MCL § 768.32(2), providing in part that "A jury shall not be instructed as to other lesser included offenses involving the same controlled substance nor as to an attempt to commit either a major controlled substance offense or a lesser included offense involving the same controlled substance. The jury shall be instructed to return a verdict of not guilty of an offense involving the controlled substance at issue if it finds that the evidence does not establish the defendant's guilt as to the commission of a major controlled substance offense involving that controlled substance. A *judge in a trial without a jury shall find the defendant not guilty of an offense involving the controlled substance at issue if the judge finds that the evidence does not establish the defendant's guilt as to the commission of a major controlled substance offense involving that controlled substance.*" (emphasis supplied).

[35] The People are not quite sure what to make of the Court of Appeals majority statement that this "giving up of one right for another" occurs "without even the ability to make an autonomous choice." One's ability to choose is "autonomous" if it is his or her's alone; that is, if the choice is within his or her sole authority. That the choice is *real*—it is not between two indistinguishable alternatives, so that there are actual consequences attached to the path one pursues—hardly means that sole authority to make the choice does not exist. Indeed, a choice that has no consequences is really a matter of indifference to the one choosing. The defendant here acts "autonomously" so long as his choice is not the result of intimidation, coercion, or deception. See *Berghuis v. Thompkins,* 560 U.S. 370, 382-383, 130 S.Ct. 2250, 2260 (2010). The defendant is *asserting* the right he has under the constitution, the right to jury trial. And as to the Court of Appeals majority's statement that the statutory prohibition on the

holding—as the People argue in section C.—this holding collapses, for there is then no "giving up one right for another." The People thus refer the Court to section C., and to *Cornell*, the controlling precedent ignored by the Court of Appeals majority.

It might be argued that the choice of fact-finder for trial—jury or judge—must, as a matter of law, be inconsequential *other* than as to the identity of the fact-finder. That is to say, no other consequence can attach to the choice. But this is not true even apart from MCL § 257.626(5); there *are* other differences than identity of the fact-finder. Jurors take an oath to render a verdict in accordance with the facts and the law,[36] and it is inappropriate for jurors to be urged to disregard that oath.[37] But jurors have the *power* to render a verdict in the teeth of the facts and law,[38] and also to dispense mercy, as well as to compromise. *This is not true of judges as fact-finders at bench trials.* Unlike juries, when rendering verdicts judges must make findings

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instruction "presents the prosecution with a potentially improper basis for refusing to consent to a requested bench trial," the People are again perplexed. The very vesting of authority to exercise choice creates a "potential" for misuse, and so to say authority should be denied because of its "potential" for abuse is essentially to disallow the vesting of almost all authority. The prosecution may not, in its exercise of authority, act in a manner which is ultra vires, nor invidiously discriminate. If it actually *does* so, relief may, depending on the context be required. See *People v. Jones,* 252 Mich.App 1, 6–7 (2002).

[36] MCL § 768.14: ""You shall well and truly try, and true deliverance make, between the people of this state and the prisoner at bar, whom you shall have in charge, according to the evidence and the laws of this state; so help you God"; MCR 2.511(H)(1): "Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God."

[37] See *People v Demers*, 195 Mich app 205 (1992).

[38] *Horning v. District of Columbia,* 254 U.S. 135, 138, 41 S.Ct. 53, 54, 65 L.Ed. 185 (1920).

of fact, and must render verdicts in accordance with that fact finding. For a judge to find facts but then "discount" the verdict, either purportedly to "dispense mercy," or as a so-called "waiver break," is inappropriate. Indeed, it may subject the judge to discipline.[39] This difference between jury trials and waiver trials *currently* exists.

If the Court of Appeals majority is correct,[40] then a trial judge at a bench trial may render a verdict on the offense of moving violation causing death in a prosecution for reckless driving causing death—though only when there is an evidentiary dispute on the element which distinguishes the greater offense from the lesser—while a jury cannot, as it will receive no instruction on that offense. As argued above, that this consequence exists is not a "trading of one right for another" unless there is a right to an instruction on moving violation causing death in a jury trial, and there is not. Perhaps it might be argued that there is some sort of violation of equal protection here. But there is certainly a rational basis for different treatment by the legislature. Juries, as has been mentioned, may compromise and dispense mercy, while judges cannot. Because judges must make findings of fact and render verdicts consistent with those findings, it is rational for a legislature to permit *that* fact-finder to consider a lesser offense, while precluding that option for a fact-finder that can render a verdict in the teeth of the law and the facts, and

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[39] *People v. Ellis*, 468 Mich. 25, 28 (2003) ("this judicial practice violates the law and a trial judge's ethical obligations").

[40] Judge K.F. Kelly's dissent suggests that the majority concern that a judge may render a verdict on moving violation causing death while a jury cannot be instructed on that offense "is contrary to the longstanding principle that '[i]n a bench trial, the trial court is presumed to know the applicable law.' . . . Given the clear intent of the Legislature to forbid consideration of the lesser misdemeanor offense of moving violation causing death when a defendant has been charged with reckless driving causing death, a judge trying a case without a jury would surely understand that he or she could not convict the defendant of the lesser offense." *Jones*, 839 N.W.2d 51, 59 (Kelly, J., dissenting).

dispense mercy, or compromise. There is, the People have argued, no constitutional right to an instruction on a lesser offense in a non-capital case, and the People believe it would be absolutely appropriate for a trial judge in a reckless driving case to give an additional instruction to the jurors, who, as has been pointed out, are strongly already presumed to follow the instructions given on the elements and burden of proof, that they must be sure not to convict simply because they believe the defendant may have done something wrong or improper in his or her driving, but must only convict if they find beyond a reasonable doubt that the defendant operated the vehicle in willful or wanton disregard for the safety of persons or property.

C. The statutory prohibition on instruction on the included offense of moving violation causing death in a reckless driving causing death case does not violate principles of separation of powers, as "determining what charges a jury may consider does not concern merely the 'judicial dispatch of litigation.' . . . The powers of the courts with reference to such matters are derived from the statutes."

Plowing the entire field that this Court harvested in *Cornell* and *McDougall v. Schanz*[41] seems excessive, and so the People will revisit only a few furrows. But first it must be noted that the Court of Appeals applied a "test"—a "fundamental requirement of the fair and proper administration of justice" test—not to be found in this Court's precedents.

1. This Court has previously held that "determining what charges a jury may consider does not concern merely the 'judicial dispatch of litigation.' . . . The powers of the courts with reference to such matters are derived from the statutes"

In *Cornell* this Court considered whether the "cognate" included offense regime created in *People v Chamblis*[42] was a proper exercise of the Court's authority. This Court concluded not,

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[41] *McDougall v. Schanz*, 461 Mich. 15 (1999).

[42] *People v Chamblis*, 395 Mich 408 (1975).

finding that the Court had strayed from the governing statute—MCL § 768.32—in *Chamblis* and its progeny.[43] It is the statute that controls, said this Court, as "matters of substantive law are left to the Legislature. . . . Determining what charges a jury may consider does not concern merely the 'judicial dispatch of litigation'. . . . Rather, the statute concerns a matter of substantive law. . . . 'The powers of the courts with reference to such matters are derived from the statutes.'"[44]

Cornell found, then, that it is the statute that controls the question of the "charges a jury may consider," so that, unless the statute functions in an unconstitutional manner, it controls. MCL § 768.32 sets forth a general provision that when an offense is charged, a jury may be instructed on and may convict the accused of an "inferior degree" of the charged offense, which, this Court determined, is one the elements of which are a subset of the elements of the greater offense. MCL § 257.626(5) is a specific prohibition, however, on instruction of moving violation causing death in a reckless driving causing death prosecution. Unless MCL § 257.626(5) is unconstitutional—and the People argue it is not—then, the powers of the courts regarding the offenses which a jury may consider being derived from the legislature, an instruction on moving violation causing death may not be given in a reckless driving causing death prosecution, as the statute flatly prohibits it.

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[43] "Beginning with a series of cases released in 1975, this Court's analysis moved away from M.C.L. § 768.32 . . ." *Cornell* 466 Mich. at 344.

[44] *Cornell,* 466 Mich. at 353.

2. Under principles of stare decisis there is no reason to revisit *Cornell*

Under principles of *stare decisis*[45] there is no reason for this Court to reconsider *Cornell.* The case correctly interprets the statute,[46] and is certainly workable. Determining those offenses that are a subset of the elements of the charged offense is certainly more workable than determining on an *ad hoc* basis those lesser offenses that are of the "same class or category, or closely related to the originally charged offense," as required by *Chamblis.* And reliance on *Cornell* is complete. Judges only instruct on offenses that are a subset of the elements of the charged offense, and supported by a rational view of the evidence, and reject requests for instructions that would be considered "cognate" offenses. There is no reason to reconsider *Cornell*'s conclusion that "determining what charges a jury may consider does not concern merely the 'judicial dispatch of litigation.' . . . The powers of the courts with reference to such matters are derived from the statutes."

3. The Court of Appeals opinion is flatly inconsistent with *Cornell*

This Court decided in *Cornell* that "determining what charges a jury may consider does not concern merely the 'judicial dispatch of litigation.' . . . The powers of the courts with reference to such matters are derived from the statutes," and the People have argued that as a matter of *stare decisis* there is no reason for this Court to now depart from these principles. The

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[45] *Robinson v. Detroit,* 462 Mich. 439 (2000).

[46] See *Schmuck v United States*, 489 U.S. 705, 716, 109 S.Ct. 1443, 1450 (1989) where the United States Supreme Court construed FRCP 31(c) to allow instruction only on lesser offenses that are a subset of the elements of the greater offense, rejecting an "inherently related" test: "We now adopt the elements approach to Rule 31(c). As the Court of Appeals noted, this approach is grounded in the language and history of the Rule and provides for greater certainty in its application."

logic of the holding of the majority opinion of the Court of Appeals would, in fact, requiring the *overruling* of *Cornell*. The Court of Appeals said:

- It is the role of the courts to effectuate the right to a properly instructed jury; it is *not* the role of the Legislature to dictate to the courts the details of how to do so. Trial judges are . . . permitted to instruct the jury however they believe best, as long as they accurately convey to the jury the material substance of the law applicable to the case.[47]

- [I]t is the Supreme Court that determines the practice and procedure to be followed by the courts in effectuating the law. . . . The Legislature's role is only[48] to *create* the law.[49]

- [I]f a necessarily included lesser offense exists, it is a violation of the principle of separation of powers for the Legislature to forbid the courts to instruct the jury on that lesser offense. A trial court's duty is to instruct the trier of fact regarding what the law actually is, and the law actually is that moving violation causing death is a necessarily included lesser offense of reckless driving causing death.[50]

But the law *also* is—and the majority opinion agreed that the Legislature's role is to *create* the law—that an instruction on moving violation causing death shall *not* be given in a case charging reckless driving causing death, as the legislature has so provided. And if trial judges are permitted "to instruct the jury however they believe best, as long as they accurately convey to the jury the material substance of the law applicable to the case,"[51] then it should be perfectly permissible for judges to identity lesser offenses that are *not* a subset of the elements of the

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[47] *People v. Jones*, 839 N.W.2d at 55.

[48] "Only"?

[49] *People v. Jones*, 839 N.W.2d at 55-56.

[50] *People v. Jones*, 839 N.W.2d at 55 -56.

[51] *People v. Jones*, 839 N.W.2d at 55.

charged offense, and to instruct on those if they so choose. At the very least, to do so would not violate separation of powers principles, and so *Cornell* would be overturned.

The majority's rationale can be stated as a syllogism, taken from the opinion itself, that on first glance seems compelling:

> "A trial court's duty is to instruct the trier of fact regarding what the law actually is."
>
> "[T]he law actually is that moving violation causing death is a necessarily included lesser offense of reckless driving causing death."
>
> A trial court has a duty to instruct on moving violation causing death in a reckless driving causing death prosecution.[52]

But when looked at closely, the logic falls apart. The reasoning suffers from the vice of ambiguity because its major premise is too broad: "A trial court's duty is to instruct the trier of fact regarding what the law actually is." If this were true, then the following syllogism would be correct:

> A trial court's duty is to instruct the trier of fact regarding what the law actually is.
>
> The law actually is that a tomato is a vegetable rather than a fruit.
>
> A trial court has a duty to instruct that a tomato is a vegetable rather than a fruit in a reckless driving causing death prosecution.

A trial court does not, of course, have a duty to instruct the jury on *everything* in the law that "actually is" law, but must instruct only on the law appropriate to the particular case being tried. And so:

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[52] Again, laying aside that the evidence also has to support giving any included offense instruction.

> A trial court's duty is to instruct the trier of fact regarding what the law actually is appropriate to the particular case being tried.
>
> The law actually is that moving violation causing death is a necessarily included lesser offense of reckless driving causing death.
>
> A trial court has a duty to instruct on moving violation causing death in a reckless driving causing death prosecution.

The conclusion still does not follow from the premises; the syllogism suffers from the fallacy of ambiguity, through equivocation. "What the law actually is" does not mean the same thing in the major and minor premises, as the terms are relative. For example:

> An elephant is an animal.
> My elephant is gray.
> My elephant is a gray animal.

This conclusion follows because the term "gray" is nonrelative. But when a relative term is employed, the syllogism fails:

> An elephant is an animal.
> My elephant is small.
> My elephant is a small animal.

The term "small" is a relative term, and the syllogism fails by way of the logical fallacy of ambiguity through equivocation.[53] Here the term "what the law actually is" is a relative term—it depends on the circumstances.

In the end, the majority opinion begs the question. The thing to be demonstrated is that a statutory prohibition on instruction on an included offense violates the separation of powers provisions of the Michigan Constitution because the matter involved is not substantive but procedural. The conclusion of the majority is that MCL § 257.626(5) is *not* the law, but its

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[53] Irving Copi, *Introduction to Logic, 3d Edition*, p. 77.

reasoning does not get it to that conclusion. Rather, the opinion assumes the conclusion, never considering the actual measure of practice and procedure as distinguished from substantive law as stated by this Court. The major premises in reasoning the matter through must be that principle laid down by *this* Court: a statutory rule is procedural if it reflects policy considerations limited to the "orderly dispatch of judicial business, i.e., court administration," and is substantive if it reflects policy considerations "over and beyond matters involving the orderly dispatch of judicial business."[54] The question here is whether MCL § 257.626(5) is not "the law" because it is not substantive, instead being concerned with the dispatch of judicial business, and thus violating separation of powers, and the majority simply assumes the answer it favors rather than demonstrating that that answer is required. Indeed, rather than answering the "substantive/procedural" question regarding the statute, the majority declares that "Correctly instructing the jury . . . arguably involves *more than mere* 'substantive law;' it is in fact a fundamental requirement of the fair and proper administration of justice." The majority opinion, then, does *not* find the statute to be concerned with the dispatch of judicial business, and therefore violative of separation of powers, it invokes a "fundamental requirement" of "correctly instructing the jury" that supercedes the distinction this Court has made between procedural and substantive rules. The majority opinion holds that disregarding the statute is therefore compelled, as following the statute would result in "incorrectly instructing the jury." In the end, what is left is a tautology: giving an instruction on included offenses is exclusively within the authority of the judiciary because the judiciary has the exclusive authority to instruct on included

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[54] *People v. Watkins* 491 Mich. 450, 474 (2012), quoting from and applying *McDougall v. Schanz*, 461 Mich. 15 (1999).

offenses.

If the Court of Appeals majority had constructed a syllogism from binding precedent from this Court, that syllogism would read:

> A legislative rule violates separation of powers if it reflects policy concerns limited to the orderly dispatch of judicial business; that is, court administration.
>
> "[D]etermining what charges a jury may consider does not concern merely the 'judicial dispatch of litigation.'"
>
> A legislative rule precluding an instruction on an included offense does not violate separation of powers.

The major and minor premises are drawn directly from this Court's precedents, from existing law that the People have urged this Court to follow under principles of stare decisis—and because they are correct—and unless the Court alters them by overruling *McDougall* and *Cornell*, the conclusion necessarily follows.

Other than its creation of a new test in the face of this Court's decision in *McDougall*—that the legislature is precluded from enacting a statute concerning a "fundamental requirement of the fair and proper administration of justice"—the Court of Appeals majority opinion relies to a small extent[55] on the opinion in *People v Binder (On Remand)*,[56] the separation of powers discussion of which this Court vacated.[57] And the discussion in *Binder* relied heavily

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[55] The majority opinion states that it does not rely on *Binder*, but only discusses it to make the point that *Binder* is not precedent. But the opinion also says that *Binder*'s separation of powers "conclusion has never been overturned on any substantive basis." *People v Jones*, 839 N.W.2d at 54.

[56] *People v. Binder (On Remand)*, 215 Mich.App. 30 (1996).

[57] "[W]e VACATE only that portion of the judgment of the Court of Appeals which held that the lesser offense and jury instruction provisions of M.C.L. § 768.32(2); M.S.A. §

on the "cognate offense" cases in the 1970's which have been displaced by *Cornell*.[58] *Binder* no more survives *McDougall* and *Cornell* than does the Court of Appeals' majority opinion here.

D. Conclusion

Affirmance of the Court of Appeals opinion would have broad consequences. If a statute precluding an instruction on an offense that is a subset of the elements of the greater offense, and supported by a rational view of the evidence, is unconstitutional as a violation of defendant's right to jury trial, then every denial of such an instruction by a trial judge on the ground that the evidence does not support the instruction, or that the lesser offense is not a subset of the elements of the greater offense, becomes, if mistaken, constitutional error. In *Cornell* this Court concluded that the trial judge did err in failing to give a requested instruction on an included offense. But this Court said that it was "satisfied that the present case concerns nonconstitutional error."[59] To prevail, then, said the Court, the defendant "must demonstrate that it is more probable than not that the failure to give the requested lesser included . . . instruction undermined reliability in the verdict." And, continued the Court, "the reliability of the verdict is undermined

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28.1055(2) are an unconstitutional infringement by the Legislature on the Supreme Court's authority over practice and procedure, under Const. 1963, art. 6, § 5, because it was unnecessary for the Court of Appeals to reach this constitutional question after determining that the defendant's conviction would be affirmed in any event." *People v. Binder*, 453 Mich. 915 (1996).

[58] "Defendant contends that the Supreme Court has already conclusively spoken on the subject in a manner which renders the disputed legislation meaningless. He argues that the determination of which instructions are required and appropriate in each case was settled by our Supreme Court in a group of cases in 1975. It was revisited with approval in 1992. *Jones, supra; People v. Carter,* 395 Mich. 434, 236 N.W.2d 500 (1975); *People v. Paul,* 395 Mich. 444, 236 N.W.2d 486 (1975); *People v. Mosko,* 441 Mich. 496, 495 N.W.2d 534 (1992). We agree that the cases cited by defendant form the basis for determining which instructions on lesser offenses are required in each criminal case." *People v. Binder*, at 41.

[59] *Cornell*, 466 Mich at 363.

when the evidence 'clearly' supports the lesser included instruction, but the instruction is not given. In other words, it is only when there is substantial evidence to support the requested instruction that an appellate court should reverse the conviction. As we must consider the 'entire cause'" pursuant to MCL § 769.26, in analyzing this question, we also invariably consider what evidence has been offered to support the greater offense."[60] But if the Court of Appeals is correct, *Cornell* must be overruled on this point, and the test for preserved constitutional error applied where a requested included offense is mistakenly declined by the trial judge. For the reasons previously stated, the Court of Appeals right to jury trial holding is mistaken.

The Court of Appeals separation-of-powers holding flies directly in the face of this Court's holding in *Cornell* that "determining what charges a jury may consider does not concern merely the 'judicial dispatch of litigation.' . . . The powers of the courts with reference to such matters are derived from the statutes." Unless this Court is to reconsider and overrule *Cornell*, because the statute here "determines a charge that the jury may consider," and because that determination "does not concern merely the judicial dispatch of litigation," so that the "powers of the courts" with regard to instructions on included offenses are "derived from the statutes," it must be upheld, and the Court of Appeals reversed.

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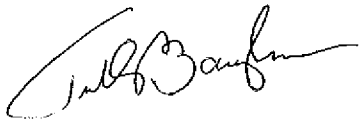
[60] *Cornell*, 466 Mich at 364-365.

Relief

WHEREFORE, the People request this Honorable Court reverse the Court of Appeals.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne



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